

Scotland and the EU: Comment by CARLOS CLOSA

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[Sionaidh Douglas-Scott](#) provides three legal arguments supporting the case for Scotland's continued membership of the EU. In my understanding, the arguments (and the whole discussion) are not purely legal but also normative. The purpose of my post is therefore to differentiate and discuss the legal and normative dimensions of these three arguments. Before that, I would like to introduce a caveat which frames my understanding of this conversation: the Scottish case acts simultaneously as a precedent and as a distinguishable case for the question of secession within the EU.

Since this is the first case of secession from a Member State and seeking EU membership simultaneously, it will become the precedent (if successful). Because of this, normative and legal arguments made, however, aim at a kind of generalising value and they are normally deployed by defenders of independence elsewhere to defend their case by analogy. I want to contend that the value of the Scottish precedent for other cases is limited precisely because of the second dimension involved: it is a distinguishable case resulting from both the coincidence of the peculiarities of UK constitutionalism and a rare political circumstance. On the one hand, the absence of a *documentary* (i.e. written) constitution means that no constitutional rule (beyond the respect for human rights and the rule of law in the process itself) obstructs Scotland's demand for independence. For any other EU member state with a documentary constitution and a system of constitutional guarantees, aspirations for independence could be easily constructed as unconstitutional aspirations. This transfers the fulcrum of the process to a political agreement. Furthermore, the political characteristics of the Scottish process make it even more *sui generis*: two different parliamentary majorities with, ostensibly, opposed views, have agreed to a peaceful resolution of the issue as raised by one of the parties. The alternative situation, i.e. two democratic majorities opposing and not finding a settlement, is equally possible and, even though one may regret the deadlock, it cannot be considered to be less legitimate. It follows from this caveat that reflections on the role of the EU in relation to secession cannot be entirely, or even primarily, derived from the Scottish case. I will return to this question at the end, but let us first turn towards the discussion of the principles.

The three principles are used to argue the case for an "internal enlargement" that produces a seamless transition (i.e. acceding via Treaty reform as regulated in Article 48 TEU) instead of a process of accession negotiations (i.e. Article 49 TEU).

Citizenship?

First, the argument from the deprivation of EU citizenship. Several authors have made the argument that uninterrupted membership constitutes a moral obligation because EU citizens should not be deprived of their rights. Despite this being the strongest normative argument, it is the weakest in legal terms: quite clearly, EU citizenship derives from the nationality of a member state, and if a territory ceases to be part of a state, and member state nationality is consequently withdrawn, it follows that union citizenship should also be withdrawn. Needless to say, the EU has not acquired the autonomous ability to grant federal citizenship to individuals who do not hold the nationality of an EU member state, as would then be the case. To tackle the immediate problems raised by independence, this calls, in practical terms, for some sort of transitional measures addressing individuals who may have their EU citizenship rights affected. The fact that Scots may be able to retain original nationality (i.e. British) could provide a good palliative. In any case, the future loss of EU citizenship related to loss of member state nationality does not constitute any basis for “engendering automatic EU membership for an independent Scotland”, as Douglas-Scott recognises.

The normative dimension of the argument, however, equally suffers from some flaws: losing EU citizenship as a result of achieving independence does not result from the actions of the EU; the EU does not deprive individuals of their rights. Rather, *it is the consequence* of freely exercising self-determination which, obviously, may have some costs. A second flaw in the normative argument refers to the asymmetrical terms with which the consequences of decision to become independent are framed, in normative terms, for those taking it and for those being affected by it. The independence decision affects not only those living in the seceding territory but those (i.e. other UK citizens) who until the very moment of independence shared their collective “self” with those deciding to become independent. It follows that there is some asymmetry (or unfairness) in demanding that the rights of seceding citizens should not be affected whilst, at the same time, externalising the cost of the decision upon others who were part of a bigger self.

Sincere Cooperation?

The second argument refers to the “principle of sincere cooperation” (Article 4(3) TEU). Sionaidh Douglas-Scott appeals to this principle to justify uninterrupted EU membership of an independent Scotland. Again, the legal and the normative sides must be differentiated. Sincere cooperation is conceived as being *among the EU member states* (and among EU institutions). The Treaty does not say anything explicit about sincere cooperation with third parties (i.e. territories) or applicant states (although this may be a moral expectation). Sincere cooperation of the EU and its member states is to be expected in relation to the UK or the rUK which is the current EU member. Put simply, the principle of sincere cooperation means the solution as to what path to take (i.e. Article 48 or Article 49 TEU) will depend essentially on what the UK/rUK authorities decide. The situation, in fact, mirrors EU policy towards the Turkish Republic of Northern Cyprus: EU policy is dictated by Cyprus who is

a legitimate member state of the EU. This presentation of the situation does not correspond with greater sympathy for the substantive positions that the rUK or Cyprus governments may respectively have. Whatever their positions may be, being democratically legitimate and law abiding member states, EU loyalty is due to them. I therefore do not believe that the principle of loyalty can be invoked in order to shield seceding territories from the costs that may affect them by becoming independent.

Sionaidh Douglas-Scott uses the word “ejection” to describe the situation of the immediate discontinuity of the Single Market in its application to Scotland. Again, this may call for remedial mechanisms but it cannot constitute the basis for “engendering automatic membership of the EU”. The normative side of the argument is very thin and not quite made explicit: the duty of loyalty towards an independent Scotland would be to adopt the practical and pragmatic attitude that she calls the Union to follow in negotiations. However, this attitude should not be confused at all with achieving any *a priori* defined outcome. A parallelism (even though an imperfect one) may be traced in relation to the Canadian Supreme Court judgement on Quebec secession:

No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.

Loyalty may equally lead down the road of either Article 48 or Article 49 and may result in long or short negotiations; it may produce the desired opt-outs and membership conditions or not. In short, loyalty should not be confused with a proxy for the absence of any costs of the decision to become independent. Former enlargements have shown evidence of members of the club trying to extract advantage out of the accession of new members; for instance, Spain faced a substantial delay in access to the EU agricultural market to satisfy France’s and other states demands and Spain negotiated substantial compensations regarding fisheries from Norway when the later applied for EU membership. There is nothing about “punishment” in this behaviour: All EU applicants have suffered some sort of “club behaviour” from current members, so the case made by the Scottish governments and others seems to be a demand to be treated as a special case: let’s obtain full advantages of statehood within the EU but avoiding the cost of being treated as an external sovereign state. There are costs associated with statehood.

EU Values?

Third, the EU values argument: independence as democracy. A large number of authors have appealed to the democratic argument: if a very large majority of citizens in a given territory demand either a referendum and/or independence, these demands somehow become morally inalienable and legitimate and, as an added consequence, the EU cannot ignore them. However, I believe that once again this is not such a solid argument as it may appear. Democracy depends entirely upon the aggregation of majorities, although majority is not, by any means, the only democratic decision-making principle (in fact, the school of economic

constitutionalism considers unanimity to be an optimal democratic constitution-making principle). Nevertheless, the principle of majority decision-making in democracies must be understood in the light of the principles of respect for human rights, the rule of law and constitutionalism (the Scottish case does not question any of these principles, clearly, but a theoretical explanation is required for the purpose of generalisation). Leaving aside human rights, the interaction with the other two principles is relevant for discussing secession. The principle of constitutionalism means the agreement to remove certain principles from unfettered democratic decision-making and grant them superior legal protection. What is constitutionalised varies greatly from polity to polity and huge divergences exist. The principle of the rule of law requires that democratic decisions adhere to the “rules of the game” and not create them in an ad hoc manner in order to favour certain decisions for which a majority may exist.

Ceteribus paribus, the argument about the embeddedness of the democratic principle applies to the EU: those who invoke EU values in Article 2 must bear in mind that democracy is not an absolute value but, rather, must be balanced against others such as rule of law. This is illustrated by the concern that, for instance, democratic decisions by the current Hungarian authorities seem to threaten the rule of law. Accordingly, democratic decisions do not, by the mere fact of their being taken by a majority, have a claim to legitimacy unless they respect other principles co-substantial with democracy such as adherence to the rule of law.

Seamless Transition?

None of the above arguments question the Scottish case for independence and EU membership. I believe that almost no one disagrees that an independent Scotland qualifies for EU membership and that it would no doubt become an EU member state. Why then is there so much normative argument around the “seamless transition”? I believe that the normative arguments examined apply to a different envisaged scenario: securing uninterrupted membership from day 1 of independence. This may or may not happen and, should it come it pass, I believe that it may be a good thing, albeit that I fail to see a “normative” case which supports it. In my opinion, these normative arguments serve to frame secession as a “costless democratic decision” by means of securing a “costless transition” which happens by means of a “seamless transition”. Much as I can share this objective, I fail to see the normative principle behind it: why should third parties guarantee to a self-determining self that its constitutive decision will be costless regardless of any other consideration? This would deprive citizenship of an essential responsibility for decisions taken which I consider indispensable to democracy.

As mentioned above, I believe that the principles invoked in the Scottish case cannot automatically be used to frame an EU policy on secession/independence *unless the same framing pre-conditions of the case (i.e. political agreement and absence of constitutional constraints) are present*. I also believe that there are three arguments which may suggest a more explicit EU policy on the issue in future.

[Weiler](#) has advanced the argument that the affirmation of “national selves” in territories departing from mature EU democratic states, that are law abiding and respectful of human rights, somehow contradicts the very essence of the European project which relativises the value of sovereign states.

The EU incentive argument: the meaning of independence within the EU differs totally from that which obtains outside the EU. The mere notion of an independent Scotland outside the EU appears unthinkable and not only for normative reasons alone but because the cost-benefit calculation differs totally between the two situations. [Neil Walker](#) has eloquently argued in this blog that

the EU both offers a spur to new projects of national sovereignty but also, (...) more emphatically, it supplies a set of considerations which makes the project of new statehood less pressing, less consequential, and **provided we can trust in continuing UK membership** of a continuing EU less relevant and ultimately unnecessary.

Facts, however, seem to prove that the independence pull is much stronger: more regional nationalist movements are slowly starting to aspire to independence within the EU and this proves that the EU offers a strong framework (inadvertently) promoting it. Moreover, his argument is framed within the current environment of withdrawal from the EU in British politics. Indeed, surely, the argument becomes less credible in the case of member states deeply committed to remaining EU members.

The decision on independence externalises some of its effects onto other EU citizens and states. Just to give an example: the decision to grant voting rights to EU citizens living in Scotland introduces, for the first time, the exercise of higher level political rights for EU citizens in unilateral way. The questions following from this decision in case of independence are theoretically relevant: will these citizens acquire Scottish nationality since they became part of the constitutive self? Equally, how would these cases be affected if the original states do not recognise dual citizenship? Other externalisation effects may be thought of. In general terms, much in the same way the all-affected principle has been claimed to demand a strengthening of the scrutiny of member state compliance with the rule of law, the same principle may demand similar responses in relation to unilateral secession/independence.

